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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-647

KAREN MARCHIORO, *et al.*,
Appellants,

v.

NEALE V. CHANEY, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (J.S. App. A)[1] is reported at 90 Wn.2d 298 and at 582 P.2d 487. The oral opinion of the Superior Court for King County (J.S. App. B) is unreported.

JURISDICTION

This action was brought under the Washington Declaratory Judgment Act, RCW ch. 7.24, seeking, *inter alia*, a declaration that a Washington statute (RCW 29.42.020), as applied, violates the First and Fourteenth Amendments to the United States Constitution. Summary judgment for appellants on this claim was granted by the King County

1. "J.S. App." refers to materials contained in the appendices to the Jurisdictional Statement filed October 17, 1978. Materials contained in the Joint Appendix will be cited as "App."

Superior Court (J.S. App. C) and reversed by the Washington Supreme Court in an opinion filed July 20, 1978 (J.S. App. A).

Appellants filed a notice of appeal in the Washington Supreme Court and in the King County Superior Court on October 13, 1978 (J.S. App. D). This Court noted probable jurisdiction on December 11, 1978.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1257(2). *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Cohen v. California*, 403 U.S. 15 (1971).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and RCW 29.42.020.

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment provides in pertinent part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .

RCW 29.42.020 provides in pertinent part:[2]

> RCW 29.42.020. State Committee. The state committee of each major political party shall consist of one committeeman and one committeewoman from each county elected by the county committee at its organization meeting.
>
> . . . .

2. The full text of RCW 29.42.020 is reproduced in the Jurisdictional Statement (J.S. App. E). Notes 11 and 14 *infra* discuss provisions of RCW 29.42.020 not challenged or involved here.

QUESTION PRESENTED

Can a state constitutionally deny a political party and its members the right to control the size and geographic composition of the party's state committee?

STATEMENT OF THE CASE

This case challenges the constitutionality of a state statute as applied (i) to prohibit the Washington Democratic Party from implementing its decision as to the size and composition of its state central committee and (ii) to bar individual party members from their seats on that committee. The statute, RCW 29.42.020, requires that the state committee of the Washington Democratic Party be composed of two county representatives from each county, no more, no less, and no one else. The Washington Democratic Party Charter requires that the Democratic State Committee be composed of two representatives from each county plus one representative from each legislative district.

Appellants are members and officers of the Washington State Democratic Party, including four persons elected as legislative district representatives to the state committee pursuant to the charter but refused participation in the committee on the grounds that RCW 29.42.020 forbids it.[3]

3. Appellants Marchioro, Baarsma, and Schroeder are the party chairpersons for the three most populous counties in Washington. Appellants Fithian, Evans, Pierce, and Reid are duly elected legislative district representatives to the state committee who have been refused seats on the basis of the challenged statute. Appellant Fisher is a county representative on the state committee as permitted by the challenged statue.

All appellants challenge the statute as an unconstitutional infringement of their First Amendment rights of freedom of association.

A. The Washington Democratic Party Organization

The Washington State Democratic Party, like party organizations in many states, is a hierarchy containing a number of related party bodies. Under party rules and state law, the state party convention is the supreme party authority.[4] The convention meets every two years, exercises plenary authority over party organization and policies, and elects delegates to National Democratic Party meetings.

Between state conventions, the Democratic State Committee is the statewide party governing body.[5] It meets at least four times each year,[6] exercises the party's policy-making functions,[7] directs the party's administrative apparatus,[8] raises and distributes funds to Democratic candidates,[9] conducts workshops to instruct candidates on effective campaign procedures and organization,[10] and seeks generally to further the party's objectives of influencing

4. Charter of the Democratic Party of Washington, art. V(F)(5) (hereinafter "Charter") (App. 15). The court below explicitly held that the Washington State Democratic Convention is the supreme Washington Democratic Party authority. 90 Wn.2d at 313-14 (J.S. App. A–16-17).

5. Charter art. IV(G)(1) (App. 10).

6. Charter art. IV(G)(5) (App. 11).

7. Charter art. IV(G)(1) (App. 10).

8. Charter art. IV(G)(2) (App. 11).

9. Charter art. IV(G)(1), (2) (App. 10-11); *see* Supplemental Exhibit to Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (filed May 31, 1977), (R., 1st Supp., 25) (article by state committee chairman in Washington State Democratic Committee newsletter discussing $40,000 raised and distributed by the state committee to candidates in 1976 and $25,000 raised and distributed in 1977).

10. Charter art. VII(C)(1) (App. 19).

policy and electing its adherents to public office. Insofar as is relevant here, the state committee is purely an internal party governing body.[11]

In 1976 the State Democratic Convention adopted a party charter provision directing that the state committee be composed of two representatives elected from each of the state's 39 counties plus one representative elected from each of the state's 49 legislative districts.[12] Pursuant to this charter provision, a number of persons, including four of appellants, were elected to serve as legislative district representatives on the state committee.

11. Although the state committee on rare occasions performs certain ballot access functions, *see* RCW 29.18.150 and 29.42.020 (filling vacancies on certain party tickets and nominating presidential electors) and Wash. Const. art. II, § 15 (selecting nominees for certain interim legislative positions), when it does so it is constitutionally required to comply with the principle of one-person, one-vote. *See, e.g., Seergy v. Kings County Republican County Comm.*, 459 F.2d 308, 313-14 (2d Cir. 1972); *Fahey v. Darigan*, 405 F. Supp. 1386, 1392 (D.R.I. 1975). The state committee has recognized this and has stipulated to the entry of an injunction ordering that the state committee be:

> enjoined from filling vacancies on the Democratic ticket for any federal or state office to be voted on by the electors of more than one county or selecting Democratic nominees for interim legislative appointments to represent multi-county districts by any method that contravenes the one-person, one-vote rule.

Cunningham v. Washington State Democratic Comm., Civ. No. C75-901 (W.D. Wash., permanent injunction entered Nov. 28, 1977). As a result of this injunction, RCW 29.42.020—which results in gross deviations from one-person, one-vote—has been superseded insofar as applied to the state committee when it performs electoral functions.

Indeed, a requirement that the state committee be apportioned to give less than nine percent of the population control of a majority of the committee is clearly irrelevant to any legitimate state interest in regulating the electoral functions of the committee. As the court below explicitly stated, appellants' attack on RCW 29.42.020 does not involve matters relating to the electoral process. *See Marchioro v. Chaney, supra*, 90 Wn.2d at 312 (J.S. App. A-15). Thus, the issue here is solely the constitutionality of a state statute as applied to regulate purely internal party decisions.

12. Charter, art. IV(G)(4) (App. 11). Prior to 1976, party rule had established the composition of the state committee as two representatives from each county. Affidavit of Karen Marchioro filed April 17, 1977, at ¶ 5 (App. 4).

B. The Effects of RCW 29.42.020

RCW 29.42.020 requires that the state committee of each major political party[13] in Washington be composed of two county representatives elected from each county, no more, no less, and no one else.[14] On the basis of this statute, appellees, the Democratic State Committee and its chairman, refused to seat the duly elected legislative district representatives.

Application of RCW 29.42.020 to bar legislative district representatives from the state committee forces the Democratic Party to accept a state committee with a geographic bias far greater than that allowed by the party charter. Under the composition mandated by RCW 29.42.020, the three most populous counties in the state, containing 52 percent of the state's population, elect less than 8 percent of the members of the state committee, while a majority of the state committee is controlled by counties containing

13. Washington law defines "major political party" as "a political party of which at least one nominee for president, vice-president, United States senator, or a state-wide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year . . . ." RCW 29.01.090. Under this definition, the Washington Democratic Party is a "major political party."

14. The requirement of a state committee was originally enacted in 1909. Wash. Laws of 1909 ch. 82, § 6. At that time the required composition was one representative from each county. In 1927 the statute was amended to require two persons from each county. Wash. Laws of 1927, ch. 200, § 1. No change in the required composition of the state committee has been made since 1927. Neither the legislative history of the 1909 and 1927 enactments nor the legislative history of subsequent reenactments gives any indication of the legislature's reasons for the required composition.

Although RCW 29.42.020 contains provisions other than the size and geographic composition requirements challenged here, the Washington Supreme Court has explicitly held that the size and composition requirements are severable from other provisions:

> Thus, although the requirement that committee members . . . be chosen pursuant to a certain formula may be void, the statutory establishment and enumeration of powers would remain, and the committee would not cease to exist or be hindered in any way.

Marchioro v. Chaney, supra, 90 Wn.2d at 302-03 (J.S. App. A–5-6); *cf. Cunningham v. Washington State Democratic Comm., supra* note 11.

The provisions of RCW 29.42.020 that are not directly affected by this suit are the electoral functions discussed *supra* in note 11 (as to which the size and composition requirements are already superseded), provisions regulating the sex of the members and the calling of meetings, and provisions giving the state committee power to call party conventions, to provide for the election of delegates to national conventions (*but cf. Cousins v. Wigoda*, 419 U.S. 477 (1975)), and to "perform all functions inherent in such an organization."

less than 9 percent of the total population.[15] Under the composition mandated by the party charter, by contrast, party members in the three counties containing 52 percent of the population have the right to elect 27 percent of the members of the state committee.[16]

C. Proceedings Below

Following the state committee's decision that RCW 29.42.020 forbids implementation of the party's charter, appellants brought suit in state court against the state committee and its chairman seeking, *inter alia*, a declaratory judgment that RCW 29.42.020, as applied to regulate the composition of the Democratic State Committee, unconstitutionally burdens appellants' First and Fourteenth Amendment rights to freedom of association.[17] Pursuant to state law, the State of Washington was served with a copy of the complaint. (R., 1st Supp., 93) The state has

15. *See* State of Washington, Office of Program Planning and Fiscal Management, *State of Washington Pocket Data Book* 255-58 (1976) (hereinafter *"Washington Pocket Data Book"*); *Marchioro v. Chaney, supra*, 90 Wn.2d at 314-15 (Horowitz, J., dissenting) (J.S. App. A–17-18).

16. *See Washington Pocket Data Book, supra* note 15, at 255-58.

17. Appellants also challenged the requirement of RCW 29.42.020 and .030 that the two persons elected as county delegates be one man and one woman. Appellants argued that this requirement violates the Washington State Equal Rights Amendment, Wash. Const. art. XXXI. The Washington Supreme Court rejected this claim. 90 Wn.2d at 308 (J.S. App. A–11). Appellants do not seek review here of the "one man and one woman" requirements of RCW 29.42.020 and .030.

neither intervened nor filed an *amicus* brief in defense of the statute.

Appellants moved for partial summary judgment, and the Superior Court for King County granted that motion, holding, *inter alia*, that the challenged provision burdens appellants' First Amendment rights to freedom of association, is unsupported by any compelling state interest, and is therefore unconstitutional as applied to the Democratic Party of Washington.[18]

Appellees appealed, and the Supreme Court of Washington reversed the trial court in a 5-4 decision, holding that (i) RCW 29.42.020 requires the party state committee to be composed of two county representatives from each county, no more and no less, (ii) although the charter provisions mandating the composition of the state committee would normally be binding on the state committee, those provisions are overridden by the requirements of RCW 29.42.020, and (iii) RCW 29.42.020 is constitutional because it imposes no substantial burden on appellants' First Amendment rights.[19]

Appellants filed a notice of appeal, and on December 11, 1978, this Court noted probable jurisdiction.

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18. The First Amendment of the United States Constitution, as far as I am concerned, protects the right of political association as well as political expression. This statute purports to control the inner workings of a voluntary political association. It might be proper if there were a compelling interest which was served by the statute, but I find that there is no such compelling state interest in any way as far as this statute is concerned. I do believe that people are entitled to voluntarily associate themselves and make their own rules as far as political parties or other types of association are concerned without state interference. . . .

Oral opinion of the court, June 15, 1977 (J.S. App. B–3); *see also* Order and Judgment (entered July 1, 1977) (J.S. App. C).

19. *See* 90 Wn.2d at 301, 312, 314 (J.S. App. A–4, 15, 17).

SUMMARY OF ARGUMENT

I.

The First Amendment protects the right of the Washington Democratic Party and its members to determine the composition of the party's governing body and protects the rights of duly elected members of that body to participate in its decisions. *Cousins v. Wigoda*, 419 U.S. 477 (1975); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

II.

RCW 29.42.020's requirement that the Democratic State Committee be composed of two representatives from each county, no more and no less, substantially burdens appellants' rights to freedom of association.

Application of the statute to bar implementation of the Democratic Party's decision to place legislative district representatives on its state committee frustrates the party's effort to establish a more representative governing body for internal party affairs and limits 50 percent of the party members to one-third the state committee representation mandated by the party charter.

Application of the challenged provisions also bars four appellants, duly elected as legislative district representatives, from taking their seats on the Democratic State Committee and participating in its decisions.

These effects substantially burden appellants' First Amendment rights to freedom of association. *NAACP v. Alabama ex rel. Patterson, supra; Fahey v. Darigan*, 405 F. Supp. 1386 (D.R.I. 1975).

III.

A statute, such as RCW 29.42.020, that imposes a substantial burden on First Amendment rights, is unconstitu-

tional unless necessary to satisfy a compelling state interest that cannot be satisfied by a less restrictive means. *Cousins v. Wigoda, supra; Dunn v. Blumstein,* 405 U.S. 330 (1972); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

IV.

No legitimate state interest exists that justifies the challenged size and geographic composition requirements of RCW 29.42.020.

An alleged state interest in stability of the electoral process is not furthered by RCW 29.42.020's requirement that party state committees be composed of no more, no less, and none other than two persons from each county. Any legitimate interest in the existence of a state committee to promote stability of the electoral process is met by the unchallenged, independent requirement that the party maintain a state committee.

An alleged state interest in ensuring geographic representation of all areas on party state committees is not legitimate. Even if it were, that interest could be served by the less restrictive means of a requirement that party state committees be composed of at least one person from each county.

Those portions of RCW 29.42.020 applied to bar the Democratic Party from including legislative district representatives on its state committee and to bar party-authorized officers from serving on that committee cannot be justified by any compelling state interest that could not be satisfied by means far less restrictive than the drastic invasion of freedom of association present here.

ARGUMENT

I. The First Amendment Protects the Rights of the Washington Democratic Party and Its Members to Organize and Participate in the Party's Internal Governing Bodies

Appellants challenge the constitutionality of a statute as applied to prohibit the Washington Democratic Party from implementing its decision as to the size and composition of its state committee and to bar individual party members from their seats on that commitee. Both applications of the statute implicate rights protected by the First Amendment right of freedom of association.

A. *Freedom of Association Protects the Right of the Washington Democratic Party and Its Members to Determine the Size and Composition of the Party State Committee*

That the First Amendment protects the right of the Washington Democratic Party and its members to determine the size and composition of their state committee cannot be seriously questioned.

In *Cousins v. Wigoda,* 419 U.S. 477 (1975), this Court considered an attempt by the State of Illinois to regulate the composition of the National Democratic Party Convention. The Court held unequivocally that the right of political parties to determine the composition of their internal party organs is protected by the First Amendment:

> The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . ."

419 U.S. at 487, *quoting Kusper v. Pontikes,* 414 U.S. 51,

56-57 (1973); *see Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 6 (1964) (association has protected right to create internal body to recommend legal counsel).[20]

Appellees have suggested that the First Amendment protects only the right to form or join groups, and not the right to administer those groups in the way that the membership determines will best further their ideals and goals.[21] This theory makes a mockery of the First Amendment. Freedom of association is more than just the right to wear a badge or carry a membership card—those are but the outward trappings of group association.

Freedom of association is the right of the members of a group to express a collective judgment and, equally important, the right to attempt to convince others that the

20. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); *accord, Cousins v. Wigoda, supra*, 419 U.S. at 487; *Kusper v. Pontikes, supra*, 414 U.S. at 56-57; *NAACP v. Button*, 371 U.S. 415, 430-31 (1963); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960).

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.

Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957) (plurality opinion).

21. For example, appellees' Motion to Affirm distinguishes *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Bates v. Little Rock*, 361 U.S. 516 (1960), on the grounds that: "Those cases thus dealt with state interference with the freedom of individuals to form groups to exercise their First Amendment freedoms of speech and petition, not state regulation of the internal structure of the groups which resulted." Motion to Affirm at 9.

group's ideals and goals are correct. The essence of a political party is its attempt to influence the thinking of voters and governmental officials so as to make the party's ideals and goals the guiding force in governmental action. In its efforts, the party must decide what actions to take and how best to present its position. The party must decide what will be said and who will say it to the best effect. It must decide which candidates to support by endorsement and which to ignore, which candidates should receive funds raised by the party and which should not. The party must decide what forms of persuasion will make and keep new converts and what encouragement will strengthen the resolve of old stalwarts.

In short, a political party is necessarily more than a charter and a crowd of card-carrying members. A political party is a functioning organization that must make a multitude of day-to-day decisions if it is ever to hope to achieve the goals for which it was organized by its members. The formation of internal party governing bodies to direct the efforts of the party and to make the day-to-day decisions is an integral part of the exercise of freedom of association.

As explained by the Court of Appeals for the District of Columbia in refusing to enjoin the delegate selection formula of the National Republican Convention:

> A party is after all more than a forum for all its adherents' views. It is an organized attempt to see the most important of those views put into practice through control of the levels of government. One party may think that the best way to do this is through a "strictly democratic" majoritarianism. But another may think it can only be done (let us say) by giving the proven party professional a greater voice than the newcomer. Which of these approaches

is the more efficacious we cannot say . . . .

What is important for our purposes is that a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution. . . . The express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association. Speeches and assemblies are after all not ends in themselves but means to effect change through the political process. If that is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.

Ripon Society v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976) (*en banc*) (opinion for the court of McGowan, J.) (emphasis in the original).[22]

A party's right to determine the composition of its internal governing bodies is particularly important where, as here, the body in question directs all party activities between conventions, makes policy statements and distributes funds to candidates, and generally determines how the party, and its goals, will be perceived by party members and by the public on a day-to-day basis.

Freedom of association plainly protects the right of the Washington Democratic Party and its members to determine the size and composition of their state committee.

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22. The crucial point is that all these potential decisions—whether to reward the ideological faithful, farmer or urban dweller or whether to encourage electoral success by rewarding those parties which actually carry the ticket—are essentially political accommodations. As such, they are a fundamental exercise of first amendment rights; second-guessing of their accuracy by the judiciary is both impossible and an unwarranted deviation from our constitutional scheme. *Ripon Society, supra*, 525 F.2d at 604 (Tamm, J., concurring in the result).

B. *Freedom of Association Protects the Rights of Individual Party Members, Duly Elected by the Party to the State Committee, to Participate in the Decision of That Committee*

Cousins v. Wigoda, supra, also stands for the proposition that individual party members have First Amendment rights to serve in internal political party positions to which they are elected. The *Cousins* petitioners were fifty-nine persons elected under Democratic Party rules to be delegates to the Democratic National Convention. A state court had enjoined them from participating in the convention and a post-convention caucus. They challenged the injunction on the grounds that it unconstitutionally burdened both their individual First Amendment rights to participate in the convention and the caucus and the First Amendment rights of the party and all party members to have them participate, and this Court sustained their challenge. *See* 419 U.S. at 481 n.3, 482, 488-89; *id.* at 492 (Rehnquist, J., concurring in the result) ("[W]e do not believe that the State's interest is sufficient to support a total restriction on the petitioners' right to assemble, associate with fellow members of a political party, and urge upon the Convention their claim to be seated as delegates."); *accord, Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (freedom of association protects right of individual party member to associate with party); *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59, 462-62 (1958) (freedom of association protects individuals' rights to associate with civil rights group).

Freedom of association plainly protects the rights of the four appellants, duly elected as legislative district representatives to the Democratic State Committee, to take their seats on that committee and to participate in its decisions.

II. RCW 29.42.020 Substantially Burdens Appellants' Rights to Freedom of Association

The challenged statute, RCW 29.42.020, substantially burdens appellants' freedom of association in two significant respects.[23] First, by blocking implementation of the Democratic Party's mandate placing legislative district representatives on its state committee, the statute substantially burdens the rights of all appellants as party members to determine the composition of their party's internal governing body. Second, the statute substantially burdens the associational rights of the four appellants duly elected to the state committee as legislative district representatives by barring them from their seats on that committee.[24]

23. The court below held that it need not engage in First Amendment scrutiny of RCW 29.42.020 because the statute imposes no "substantial burden" on appellants' "right of free association." 90 Wn.2d at 312 (J.S. App. A–15). The court's holding appears to be based on the court's erroneous conclusion that the right of free association protects only against racial discrimination and direct interference with the casting of votes, and does not extend to "other aspects of the political process." *See* 90 Wn.2d at 309 (J.S. App. A–12). As shown in Part I, *supra*, freedom of association is not so limited.

In view of the plain restraints RCW 29.42.020 imposes on the Washington Democratic Party and appellants, it is impossible to hold that freedom of association protects political parties' internal organization and yet conclude, as did the court below, that the statute imposes no substantial burden on appellants' rights of freedom of association.

24. This Court has used several different phrases to indicate when an effect on First Amendment interests is subject to strict scrutiny. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("substantial restraint"); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) ("significant interference"); *Storer v. Brown*, 415 U.S. 724, 729 (1974) ("substantial burdens").

Technically speaking, the effects of RCW 29.42.020 are no mere burden, they are an absolute bar and should therefore be characterized in terms of "substantial interference" or "substantial restraint." Nevertheless, because the Washington Supreme Court held that the statute imposes no "substantial burden" on appellants, *see* note 23 *supra*, and because all three terms are generally viewed as connoting the same degree of interference, appellants will refer to the "substantial burden" imposed by RCW 29.42.020.

A. *RCW 29.42.020 Substantially Burdens the Rights of All Appellants as Democratic Party Members to Control the Size and Composition of the Party State Committee*

The Convention of the Democratic Party of Washington, the supreme party authority, has adopted a party charter provision requiring that the state committee be composed of two persons elected from each county plus one person elected from each legislative district. RCW 29.42.020 prevents the party from implementing this decision by requiring that the state committee be composed of two county representatives elected from each county, no more, no less, and none other.

By negating the party's decision to have both county representatives and legislative district representatives on its state committee, RCW 29.42.020 unquestionably imposes a substantial burden on the Democratic Party's right to decide for itself how it shall be governed. The two persons per county statutory formula allows 20 small counties, containing less than nine percent of the population, to elect a majority of the state committee, while Washington's three most populous counties, containing more than 50 percent of the State's population, elect only 8 percent of the state commitee's membership.[25] Under the party charter formula, party members in the three counties containing 50 percent of the population would elect 27 percent of the state committee's membership.[26]

RCW 29.42.020 thus wholly frustrates the party's effort to establish a more representative governing body for in-

25. *See* 90 Wn.2d at 314-15 (J.S. App. A–17-18) (Horowitz, J., dissenting); *Washington Pocket Data Book, supra* note 15, at 255-58.

26. *See Washington Pocket Data Book, supra* note 15, at 255-58.

ternal party matters.[27] The statute forces the Democratic Party to be governed by a state committee controlled by a minority of party members from primarily rural counties[28] and limits 50 percent of the party members to one-third the voting power mandated by the party charter.[29]

These effects of RCW 29.42.020—barring implementation of the Democratic Party's charter, frustrating the party's decision as to the composition and constituency of its state committee, and altering the weight of individual party members' votes from that set by the party—all substantially burden the First Amendment rights of the party and appellant party members.

Cousins v. Wigoda, 419 U.S. 477 (1975), is directly on point. In *Cousins*, an Illinois court enjoined the seating of certain persons (the "Cousins delegates") at the National Democratic Party Convention on the ground that Illinois

27. The Party Charter, art. VI provides, in pertinent part:

> Basic Principles
>
> A. Open Party
>
> . . . .
>
> 2. *All members of the Party shall enjoy equal rights, protection and opportunities* in all governing documents and *in all proceedings of the party at all levels.*
>
> . . . .
>
> C. Fair Representation
>
> 1. *In elections at all levels of the Party in which policy is determined or in which delegates, officers, other Party officials, and nominees for public officials are to be selected, procedures shall:*
>
> a. Provide full, equal, timely participation;
>
> b. *Assure fair, proportional representation of preferences* . . .

Charter, art. VI (App. 15-17) (emphasis added).

28. "[T]he vote of one Democrat in Garfield County has an influence in the state committee equal to the votes of nearly 400 Democrats in King County." 90 Wn.2d at 318 (J.S. App. A–21) (Horowitz, J., dissenting).

29. Nor is the statute's interference with the constituency of the state committee limited to its imposition of minority dominance. RCW 29.42.020, by forbidding the seating of legislative district representatives, also prevents groups who have district-wide support but not county-wide support from making their voices heard.

law governed the composition of the Illinois delegation and prohibited the seating of the Cousins delegates. The Cousins delegates challenged this injunction, arguing that the Democratic Party had determined that they should participate in the Convention and that the action of the Illinois court burdened, *inter-alia*, the right of the National Democratic Party and its members to freedom of association. *See* 419 U.S. at 482. This Court agreed. *See* 419 U.S. at 487 ("The National Democratic Party and its adherents enjoy a constitutionally protected right of political association."). This Court concluded that Illinois' interference with the composition of the Democratic Party convention could be constitutional only if justified by a compelling state interest and that Illinois had no such interest. *See* 419 U.S. at 487, 489-91.

Cousins v. Wigoda stands squarely for the proposition that state interference with the composition of internal political party organs imposes a substantial burden on the associational rights of the party and its members and can be justified only by a compelling state interest.[30] As stated

30. *Cousins'* holding on "substantial burden" cannot be distinguished because it involved state regulation of a national political party rather than the state regulation of a state political party present here.

The test of whether state law substantially burdens associational rights is the same whether the association involved is a neighborhood civil rights group or a party caucus or a national convention. *Compare Kusper v. Pontikes*, 414 U.S. 51 (1973) (treating equally burden on local, state, and national party association), *Bates v. Little Rock*, 361 U.S. 516 (1960) (burden on membership in local branch of NAACP), and *NAACP v. Alabama*, 357 U.S. 449 (1958) (burden on state NAACP membership), *with Cousins v. Wigoda*, 419 U.S. 447 (1975) (burden on participation in party caucus and national party convention).

The fact that a state regulates national, as opposed to state, parties is relevant *only* to the question whether a compelling state interest exists to justify such regulation. *See* L. Tribe, *American Constitutional Law* 787 (1978). The question whether any compelling state interest justifies RCW 29.42.020's substantial burden on appellants' associational rights is addressed in Part IV *infra*.

by Mr. Justice Rehnquist:

> The operation of the injunction issued by the Illinois Circuit Court in this case was as direct and severe an infringement of the right of association as can be conceived.

Id. at 491-92 (Rehnquist, J., concurring in the result).

In *Fahey v. Darigan*, 405 F. Supp. 1386 (D.R.I. 1975), the district court for Rhode Island applied *Cousins* to a situation very similar to that presented here. For many years the Rhode Island Democratic Party had fixed at 11 the size of Democratic ward committees in the City of Providence. In 1975 the Rhode Island legislature enacted a statute requiring that these committees be composed of 19 persons. Two Democratic Party members challenged the statute on the ground that the legislation unconstitutionally burdened their First Amendment right to conduct internal party affairs without unjustified state interference. 405 F. Supp. at 1394-96. Unlike the present case, the statute in *Fahey* did not alter the constituency of the ward committees or the weight of each party member's vote in selecting the membership of those committees. The court stated, nevertheless, that:

> We should not lightly dismiss, as *de minimis*, a party's choice of organizational structure even though the state interference at issue involves a mechanically applied, numerical or formal requirement.

405 F. Supp. at 1397. The court concluded:

> [T]he state intrusion at issue, which governs internal political party structure and not access to the state ballot, *imposes a substantial burden upon plaintiffs' associational rights* and is therefore subject to strict judicial scrutiny.

Id. at 1398 (emphasis added).[31]

The requirement of the Washington Democratic Party Charter that the state committee be composed of two persons per county plus one from each legislative district is the "party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests." *Ripon Society, supra*, 525 F.2d at 585. RCW 29.42.020 prohibits implementation of this choice, prevents the party from reducing the state-ordered disparity in voting strengths as among party members, and, as a practical matter, vests control of the state committee in rural groups with county-wide support. The decisions of this Court and of lower federal courts establish that this state interference with the party's choice of internal self-government constitutes a substantial burden on the First Amendment associational rights of the party and of all party members.

B. *RCW 29.42.020 Substantially Burdens the Rights of Appellant Legislative District Representatives to Participate in the Decisions of the State Committee*

The effects of RCW 29.42.020 are felt not only by all appellants as party members, but also by the four appellants duly elected as legislative district representatives to

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31. "Last term the Court in *Cousins* v. *Wigoda* placed the internal workings of a political party squarely within the protection of the First Amendment . . . . If First Amendment rights are exercised when a Party determines the make-up, or perhaps even the existence, of state delegations, we think the same is true when it determines their size."

405 F. Supp. at 1398, quoting *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 586 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 424 U.S. 933 (1976).

the state committee. RCW 29.42.020 bars these four appellants from serving in their party authorized roles as voting members of that committee.

Decisions of this Court firmly establish that individuals have First Amendment rights to participate in party affairs and that governmental action barring or even discouraging such participation substantially burdens the individual's rights of freedom of association.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the NAACP asserted both its rights and the individual rights of its members in challenging a statute requiring disclosure of the members' names. This Court considered only the rights of the members, *see* 357 U.S. at 458-59, and held that the likelihood that disclosure would induce individuals to withdraw their participation or to forego becoming members constituted a "substantial restraint" on the rights of those individuals to associate freely. 357 U.S. at 462-63; *accord, Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (state restrictions on voting in party primaries "substantially abridged" individual party member's right to associate with party); *Bates v. Little Rock*, 361 U.S. 516, 523-24 (1960) (disclosure of membership lists likely to work "significant interference" with members' freedom of association); *see Cousins v. Wigoda, supra* (rights of individual delegates to participate in the National Democratic Convention can be denied only if necessary to serve a compelling state interest).

The challenged statute bars four individual appellants from participating in the Democratic State Committee to which they were duly elected under the party's mandate. Under the decisions of this Court, the statute substantially burdens these appellants' First Amendment rights to freedom of association.

III. RCW 29.42.020 Is Constitutional Only if Necessary to Meet a Compelling State Interest That Cannot Be Satisfied by Less Restrictive Means

RCW 29.42.020 imposes substantial burdens on appellants' First Amendment rights to freedom of association. The statute can withstand constitutional scrutiny only if justified by a compelling state interest. As this Court held in *Cousins v. Wigoda, supra:*

> Even though legitimate, the " 'subordinating interest of the State must be compelling' . . ." to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

419 U.S. at 489; *accord, Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Kramer v. Union School District*, 395 U.S. 621, 627 (1969).

Even a legitimate state interest compelling enough to justify substantial interference with First Amendment rights cannot justify a statute if the interest can be satisfied by a less restrictive means.

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Dunn v. Blumstein, 405 U.S. at 343. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. at 438. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Kusper v. Pontikes, 414 U.S. 51, 59 (1973); *accord, Dunn v. Blumstein, supra*, at 343 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

RCW 29.42.020's substantial interference with the Washington Democratic Party's internal organization and with

appellants' participation in party affairs can be sustained only if justified by a compelling state interest that cannot be satisfied by a less restrictive means.

IV. No State Interest Justifies RCW 29.42.020's Requirement That the Democratic State Committee Be Composed of Only Two Representatives From Each County

The challenged provisions of RCW 29.42.020 require that the state committee of the Washington Democratic Party be composed of no more, no less, and none other than two county representatives elected from each county. The challenged provisions are defended as necessary (1) to ensure "stability and integrity of the electoral process"[32] and (2) to ensure "that all areas of the state are represented in its political process."[33] Neither alleged interest, even if legitimate, justifies the substantial burden RCW 29.42.020 imposes on the Washington Democratic Party's right to internal self-government and on appellants' rights to participation in party affairs.

A. *A State Interest in "Stability and Integrity of the Electoral System" Does Not Justify the Challenged Requirements*

Appellees have argued that the state has a compelling interest in ensuring that each major political party has an administrative body between conventions, because the existence of such committees is allegedly necessary to ensure the stability and integrity of the electoral process.[34]

32. Appellees' Motion to Affirm at 16; Brief of Appellants (appellees here) at 41-43 (Wash. Sup. Ct., filed Sept. 16, 1977) (hereinafter "Appellees' Wash. Sup. Ct. Br.").

33. Appellees' Wash. Sup. Ct. Br., *supra* note 32, at 43-44.

34. *See* note 32 *supra*.

Appellants question whether party state committees are in fact essential to the stable functioning of state electoral systems. Even assuming, however, that the existence or even "stability" of party state committees is essential to further a compelling state interest in stability of the electoral process, this interest does not justify the requirement of two representatives from each county, no more and no less, on the state committee. Any need for existence or "stability" of the state committee is served by a simple requirement that the party maintain a state committee. As the court below explicitly held, a ruling upholding appellants' challenge to RCW 29.42.020's size and geographic composition requirements will not affect the independent requirement that the Washington Democratic Party maintain a state committee. *Marchioro v. Chaney, supra,* 90 Wn.2d at 302-03 (J.S. App. A—5-6).

RCW 29.42.020's rigid requirement that the state committee be composed of two county representatives from each county, and no one else, cannot be defended as a precisely tailored regulation necessary to ensure stability of the electoral process. Indeed, the only conceivable purpose of this rigid requirement is to ensure representation of all geographic areas on the state committee.

B. *A State Interest in "Ensuring That All Areas of the State Are Represented in Its Political Process" Does Not Justify the Challenged Requirements*

Appellees have argued that the Democratic Party's state committee must be made up of two persons from each county to satisfy a state interest in ensuring that all geographic areas of the state are represented on the state committee.[35] Contrary to appellees' assertions, the state

35. *See* note 33 *supra*.

has no legitimate interest in requiring that the internal governing body of a political party represent all geographic areas of the state. *See generally Moore v. Ogilvie,* 394 U.S. 814, 818-819 (1969); *Davis v. Mann,* 377 U.S. 678 (1964).

The only purpose for ensuring that all geographic areas are represented on the Democratic State Committee is to ensure representation within the Democratic Party of the various political interests that are identified with the different geographic areas. This is nothing more than an attempt to prescribe official orthodoxy in Democratic Party politics. RCW 29.42.020's requirement that all geographic areas be represented on the Democratic State Committee is no more legitimate than would be a state requirement that the committee contain at least one aerospace worker, one wheat farmer, one urban resident, one liberal, and one conservative.

> [I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .

Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

Even assuming that the state did have a legitimate interest in requiring that the state committee represent the political interests of all geographic areas, RCW 29.42.020 would be an excessively restrictive means of achieving that goal. Representation of all areas could be achieved, for example, by requiring that the state committee contain *at least* one person from each county, with the party left free to determine what additional persons should be added.

No state interest in geographic diversity justifies requiring, in the face of a contrary party mandate, that the Democratic State Committee be constituted such that the

political interests of rural counties containing less than nine percent of the population control a majority of the votes, and counties containing a majority of the population receive only eight percent of the votes.

CONCLUSION

RCW 29.42.020 substantially burdens the First Amendment rights of appellant party members and officers to organize and participate in the Democratic State Committee. Neither an alleged state interest in ensuring stability of the electoral process nor an alleged state interest in ensuring representation of all geographic areas on internal party bodies justifies this statute's drastic interference with appellants' rights to freedom of association.

The judgment of the Washington Supreme Court holding constitutional the size and geographic composition requirements of RCW 29.42.020 as applied to the Democratic Party of Washington should be reversed.

Respectfully submitted,

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